Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v Poh Yang Hong

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–62–02 OF 2013
ABDUL WAHAB PATAIL, LINTON ALBERT AND VERNON ONG JJCA
10 JUNE 2015

Tort — Negligence — Breach of duty — Buyer of land entered into sale and purchase agreement ('SPA') with owner based on particulars of private search done at land registry — Buyer after concluding purchase found land had another title registered in name of third party — Whether registrar of land titles and, vicariously, Government of Malaysia, liable for damages for breach of duty of care to buyer in failing to ensure land register contained true particulars of land and identity of owner — Whether s 22 of the National Land Code could not absolve registrar of liability — Whether registrar could not evade responsibility by saying buyer should have done official search instead of private search before signing the SPA

The respondent entered into negotiations to buy a piece of vacant land ('GRN 232') belonging to one Ng Lai Yin ('D1') for RM4.5m and paid the latter an earnest deposit of RM89,023.20 ('earnest deposit') pending the execution of a formal sale and purchase agreement ('SPA'). After the respondent's solicitors carried out a private search at the Kuala Lumpur land registry and confirmed that D1 was stated as the registered owner of GRN 232, the respondent signed the SPA with D1 and paid him the balance of the 10% deposit under the agreement amounting to RM356,092.80. When the plaintiff visited GRN 232 with his architect some months after fully settling the purchase price for the land, they were told to leave by a person ('Mohamad') who claimed to be the owner of the land. The respondent's solicitors immediately carried out two official searches on the land and found that the land had two titles sharing the same lot number – one title, GRN 232, had D1 as the registered owner while the other, PN 20992, was registered under Mohamad's name. The respondent sued the appellants in the High Court for damages for negligence for failing to ensure the particulars of the register at the Kuala Lumpur land registry were accurate. In their defence, the appellants contended that (a) they owed no duty of care to the respondent; (b) the information obtained by the respondent under the private search was accurate at the time it was done; (c) they were not liable because the respondent should have done an official search and not a private search before entering into the SPA; (d) s 22 of the NLC absolved them of any liability; and (e) an unidentified third party had caused a forgery of the GRN 232 title. The High Court disallowed the plaintiff's claim for the earnest

deposit (because it was paid before the private search was done) but allowed the claim for RM356,092.80 which was paid following the search. The High Court held, inter alia, that the first appellant breached its duty of care to the respondent and failed to ensure that the land register reflected the full and true particulars of the land including the identity of its registered owner and that s 22 of the NLC did not apply to the facts of the case. The appellants appealed against the whole of the High Court's decision whilst the respondent cross-appealed against a part of the decision.

Held, dismissing both the appeal and the cross-appeal:

(1) The two sets of titles for the same land in the land registry led to no other conclusion than that there was something amiss with the records in respect of that land. It should not have happened. It could only have happened if someone in the land registry had accessed the database to create the sets of title records and was not the act of some third party outside. The submission that it was the act of a third party held no merit. The High Court did not err in finding the appellants had failed to ensure the records for the land were accurate (see para 12).

(2) The submission that the appellants owed no duty of care to the plaintiff was without merit. They were required by the National Land Code to keep and maintain a register of land titles which not only served the administrative function of recording who owned what, but also a more important economic objective of providing assurance to intending buyers of land that it was safe to purchase land from the person whose name was on the register. Authority carried with it responsibility, and authority over every citizen carried with it responsibility to every citizen affected by the actions or inactions in carrying out that responsibility. It was the basis upon which the relationship of proximity and duty of care and liability was founded. The damage suffered in this case was clearly foreseeable (see para 13).

(3) The appellants' contention that the particulars supplied at the time of the first search was accurate was without merit and did not explain why particulars obtained upon a search in the registry could be accurate at one point of time and cease to be so at another. This militated against the very reason for the existence of the National Land Code (see para 14).

(4) The appreciable difference between a private search and an official one was that the former might not show dealings that were in the process of registration. But that apparent difference was of little relevance as the cause of action was not the accuracy of what was printed on the private and official search forms but the failure to ensure the particulars in the register were accurate and that it could not even be arguably correct that there could be two sets of records for the same piece of title, each with a

different person registered as the proprietor. There was also nothing in the private search form to say the particulars obtained from the search were not binding (see para 16).

(5) Section 22 of the NLC had no application in the instant case. The existence of two sets of record of title under two different persons as registered owner militated against the conclusion that the appellants' action, without explanation, was 'in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act' (see para 18).

(6) The respondent had produced evidence of the SPA and copies of the other documents including the cheques issued. Apart from the appellants professing to not being satisfied with the evidence produced by the respondent, nothing was placed on the scales of justice to tilt the balance against the respondent. Since the High Court had disallowed only the earnest deposit of RM89,023.20, the respondent was entitled to the balance RM4,362,136 under the SPA together with interest and costs (see paras 19, 21 & 23–24).

(7) The appellants failed to demonstrate that the High Court had erred such as to warrant appellate intervention (see para 25).

[Bahasa Malaysia summary

Responden telah memasuki rundingan untuk membeli sebidang tanah kosong ('GRN 232') milik Ng Lai Yin ('D1') sejumlah RM4.5 juta dan telah membayar D1 jaminan wang pendahuluan sejumlah RM89,023.20 ('jaminan wang pendahuluan') sementara menunggu selesai pelaksanaan perjanjian jual beli yang rasmi ('PJB'). Selepas peguam cara responden menjalankan carian persendirian di pejabat daftar tanah Kuala Lumpur dan mengesahkan bahawa D1 dinyatakan sebagai pemilik berdaftar GRN 232, responden telah menandatangani PJB itu dengan D1 dan membayarnya baki 10% wang pendahuluan di bawah perjanjian itu yang berjumlah RM356,092.80. Apabila plaintif melawat GRN 232 bersama arkiteknya beberapa bulan selepas menyelesaikan sepenuhnya harga belian tanah itu, mereka diberitahu untuk pergi dari situ oleh seseorang ('Mohamed') yang mendakwa dirinya pemilik tanah itu. Peguam cara responden dengan segera menjalankan dua carian rasmi ke atas tanah itu dan mendapati bahawa tanah itu mempunyai dua hak milik yang berkongsikan nombor lot yang sama – satu hak milik, GRN 232, menyatakan D1 sebagai pemilik berdaftar manakala yang satu lagi, PN 20992, telah didaftarkan atas nama Mohamed. Responden telah menyaman perayu-peryau di Mahkamah Tinggi untuk ganti rugi kerana kecuaian untuk gagal memastikan butiran-butiran daftar di pejabat daftar tanah Kuala Lumpur adalah tepat. Dalam pembelaan mereka, perayu-perayu berhujah bahawa: (a) mereka mempunyai kewajipan berjaga-jaga terhadap responden; (b) maklumat yang diperoleh oleh responden di bawah carian persendirian adalah tepat pada

masa ia dilakukan; (c) mereka tidak bertanggungjawab kerana responden patut melakukan satu carian rasmi dan bukan carian persendirian sebelum memasuki PJB itu; (d) s 22 Kanun Tanah Negara ('KTN') membebaskan mereka daripada apa-apa liabiliti; dan (e) satu pihak ketiga yang tidak dikenalpasti telah menyebabkan pemalsuan hak milik GRN 232. Mahkamah Tinggi tidak membenarkan tuntutan plaintif untuk jaminan wang pendahuluan itu (kerana ia telah dibayar sebelum carian persendirian dilakukan) tetapi membenarkan tuntutan sejumlah RM356,092.80 yang telah dibayar berikutan carian itu. Mahkamah Tinggi memutuskan, antara lain, bahawa perayu pertama telah melanggar kewajipan berjaga-jaganya terhadap responden dan gagal memastikan daftar tanah itu menyatakan butiran-butiran penuh dan benar tentang tanah itu termasuklah identiti pemilik berdaftarnya dan bahawa s 22 KTN tidak terpakai kepada fakta kes. Perayu-perayu telah merayu terhadap keseluruhan keputusan Mahkamah Tinggi manakala responden merayu balas terhadap sebahagian keputusan itu.

Diputuskan, menolak kedua-dua rayuan dan rayuan balas:

(1) Dua set hak milik untuk tanah yang sama dalam daftar tanah itu membawa kepada satu kesimpulan bahawa terdapat suatu yang tidak kena dengan rekod berkaitan tanah tersebut. Ia tidak patut berlaku. Ia hanya boleh berlaku jika seseorang dalam daftar tanah itu mempunyai akses kepada pangkalan data untuk membuat set-set rekod hak milik dan bukan tindakan luar pihak ketiga. Penghujahan bahawa ia adalah tindakan pihak ketiga tidak mempunyai merit. Mahkamah Tinggi tidak terkhilaf dalam mendapati perayu-perayu telah gagal untuk memastikan rekod-rekod untuk tanah itu adalah tepat (lihat perenggan 12).

(2) Penghujahan bahawa perayu-perayu tidak mempunyai kewajipan berjaga-jaga adalah tanpa merit. Mereka dikehendaki oleh Kanun Tanah Negara untuk menyimpan dan menyenggara suatu daftar untuk hak milik tanah yang bukan sahaja melaksanakan fungsi pentadbiran merekodkan siapa yang memiliki apa, tetapi juga tujuan ekonomi yang lebih penting untuk memberikan jaminan kepada bakal pembeli tanah itu bahawa ia selamat untuk membeli tanah daripada orang yang namanya atas daftar itu. Kuasa yang dijalankan bersama tanggunjawab, dan kuasa ke atas setiap warganegara dilaksanakan bersama tanggungjawab ke atas setiap warganegara yang terjejas akibat tindakan atau ketiadaan tindakan dalam melaksanakan tanggungjawab tersebut. Ia adalah asas yang mana hubungan rata dan kewajipan berjaga-jaga dan liabiliti didapati. Ganti rugi yang dialami dalam kes ini jelas boleh diramal (lihat perenggan 13).

(3) Hujah perayu bahawa butiran-butiran yang dibekalkan pada masa carian pertama itu tepat adalah tanpa merit dan tidak menjelaskan kenapa butiran-butiran yang diperoleh atas carian dalam daftar adalah tepat pada

suatu masa dan tidak lagi pada masa lain. Ini bercanggah dengan sebab kewujudan Kanun Tanah Negara (lihat perenggan 14).

(4) Perbezaan antara carian persendirian dan yang rasmi adalah di mana carian persendirian mungkin tidak menunjukkan urusan-urusan yang dalam proses pendaftaran. Namun perbezaan ketara itu tidak relevan kerana kausa tindakan bukan ketepatan apa yang dicetak pada borang carian persendirian dan rasmi tetapi kegagalan untuk memastikan butiran-butiran dalam daftar itu tepat dan bahawa ia tidak boleh langsung dihujah sebagai betul bahawa boleh terdapat dua set rekod untuk hak milik tanah yang sama, setiap satu dengan orang berbeza berdaftar sebagai tuan punya. Juga tiada apa-apa dalam carian persendirian untuk menyatakan butiran-butiran yang diperoleh daripada carian itu tidak mengikat (lihat perenggan 16).

(5) Seksyen 22 KTN tidak terpakai dalam kes ini. Kewujudan dua set rekod hak milik di bawah dua orang berbeza sebagai pemilik berdaftar bercanggah dengan kesimpulan bahawa tindakan perayu-perayu, tanpa penjelasan, adalah 'in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act' (lihat perenggan 18).

(6) Responden mengemukakan keterangan PJB itu dan salinan dokumen lain termasuklah cek-cek yang dikeluarkan. Selain daripada perayu-perayu mengakui tidak berpuas hati dengan keterangan yang dikemukakan oleh responden, tiada apa-apa yang diletakkan atas skala keadilan agar imbangan condong terhadap responden. Oleh kerana Mahkamah Tinggi hanya tidak membenarkan jaminan wang pendahuluan RM89,023.20, responden berhak kepada baki RM4,362,136 di bawah PJB bersama faedah dan kos (lihat perenggan 19, 21 & 23–24).

(7) Perayu-perayu telah gagal menunjukkan bahawa Mahkamah Tinggi terkhilaf untuk mewajarkan campur tangan pihak rayuan (lihat perenggan 25).]

Notes

For cases on breach of duty, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 1175–1204.

Legislation referred to

National Land Code ss 22, 384, 385, 386

Appeal from: Civil Suit No S4-21–191 of 2008 (High Court, Kuala Lumpur)

Haryati bt Ahmad (Senior Federal Counsel, Attorney General's Chambers) for the applellants.
V Vijakumar (Albar & Partners) for the respondent.

Vernon Ong JCA:

INTRODUCTION

[1] This appeal relates to a decision of the High Court giving judgment for the plaintiff's claim against Pendaftar Hakmilik, Wilayah Persekutuan Kuala Lumpur and Kerajaan Malaysia (the second and third defendants respectively) for damages for negligence for failing to ensure that the particulars of records of the land registry is accurate.

[2] Judgment in default has been taken against the first defendant.

[3] The second and third defendants are appealing against the whole of the High Court decision whilst the plaintiff is cross-appealing against a part of the decision of the High Court. In this grounds of judgment, the parties shall be referred to as they were in the High Court.

BRIEF ACCOUNT OF THE SALIENT FACTS

[4] The plaintiff entered into negotiations with the first defendant to purchase a piece of vacant land held under GRN 232, Lot 349 Seksyen 71, Bandar Kuala Lumpur Daerah Kuala Lumpur Negeri Wilayah Persekutuan Kuala Lumpur ('the land') measuring 1688 sq meters. According to the document of title to the land, the first defendant is the registered owner of the land. The following chronology is a summary of the key events:

28 August 2007	In furtherance to the agreement between the plaintiff and the first defendant to enter into a sale and purchase agreement, the plaintiff paid to the first defendant's solicitors RM89,023 as earnest deposit.
18 September 2007	The plaintiff's solicitors conducted a private search ('the private search') at the land registry of the Wilayah Persekutuan Kuala Lumpur. According to the private search the first defendant is the registered owner of the land.

8 October 2007	The plaintiff and the first defendant entered into a sale and purchase agreement dated 8 October 2007 ('the SPA') under which the plaintiff agreed to purchase and the first defendant agreed to sell the land for a total consideration of RM4,451,160.
6 November 2007	The plaintiff obtained a loan of RM2.5m from HSBC Bank Malaysia Bhd to part finance the purchase of the land.
5 December 2007	The plaintiff made two payments of RM1m and RM506,044 to the first defendant's solicitors.
11 February 2008	The transfer and the charge documents were presented to the second defendant's office for registration.
19 February 2008	The loan sum of RM2.5m is disbursed to the first defendant's solicitors.
10 March 2008	Messrs Rajendran & Deen, solicitors for one Loh Kok Choy ('Loh') wrote to the land registry of Wilayah Persekutuan Kuala Lumpur informing that the original document of title is in their possession. They also asked the latter not to proceed with the registration of the transfer of the land in favour of the plaintiff.
3 June 2008	The plaintiff and his architect visited the land. They are asked to leave by one Mohamad Nor bin Mohamad ('Mohamad') who claimed to be the owner of the land.
4 June 2008	The plaintiff's solicitors conducted two official land searches ('the official searches'). They discovered that the land was in fact held under two different sets of titles: a) GRN 232 Lot 349 Seksyen 71, Bandar Kuala Lumpur Daerah Kuala Lumpur Negeri Wilayah Persekutuan Kuala Lumpur under which the first defendant was the registered owner; and b) PN 20992 Lot 349 Seksyen 71 Bandar Kuala Lumpur Daerah Kuala Lumpur Negeri Wilayah Persekutuan Kuala Lumpur under which Mohamad was the registered owner.
5 June 2008	The plaintiff lodged a police report at the Jalan Bandar Police Station.
9 June 2008	The first defendant's solicitors forwarded to the plaintiff's solicitors a statutory declaration of the first defendant. According to the statutory declaration the land had been alienated to him by the Kuala Lumpur Land Office through the services of one How Yee Yah ('How'), a so-called land alienation consultant. The first defendant also declared that he had been paid RM500,000 for his services and that he had collected the balance purchase price for the land and paid it in cast to How.

THE PLAINTIFF'S CLAIM AGAINST THE SECOND AND THIRD DEFENDANTS

[5] In essence, the plaintiff's claim for damages is premised on the tort of negligence. The particulars of negligence as pleaded are as follows:

(a) failure to ensure that the particulars of the land as per the registered records of the second defendant's land registry are at all times accurate;

(b) failing to ensure that the particulars of the land as per the registered records of the second defendant's land registry and as furnished by the second defendant to the plaintiff on payment of a fee, contain accurate details of the land which can be relied on by the plaintiff; and

(c) maintaining inconsistent and/or contradictory entries in respect of particulars of land registered with the registry and in consequence, providing members of the public, like the plaintiff, information relating to the land on which a search is conducted on payment of the requisite fee, and which information is not true or incorrect to the detriment of the member of the public making the search and relying thereon, like the plaintiff.

THE SECOND AND THIRD DEFENDANTS' DEFENCE

[6] Briefly, the pleaded defence is mounted on the following main planks:

(a) the second and third defendants do not owe any duty of care to the plaintiff;

(b) the information supplied to the plaintiff under the first search was accurate according to the second defendant's records at the time it was provided;

(c) the second and third defendants are not liable by virtue of the protection accorded under s 22 of the NLC;

(d) the existence of the forged title bearing the description GN 232 was caused by the conduct of a third party; and

(e) that they are not liable as the search conducted by the plaintiff on 18 September 2007 at the second defendant's land registry was a private search under s 384 of the National Land Code ('the NLC') and not an official search under s 385 of the NLC.

FINDINGS OF THE HIGH COURT

[7] The findings of the learned trial judge after full trial may be summarised as follows:

(a) the second defendant is charged with the statutory duty to maintain a register of all lands caused to be registered at the registry, Wilayah Persekutuan, Kuala Lumpur;

(b) the second defendant must take all reasonable steps to ensure that the register contains only correct, true and accurate information;

(c) the second defendant owes a duty of care to the plaintiff to ensure that the register reflects the true and actual description of the title to the land and the true identity of the registered proprietor of the land;

(d) there was a clear breach by the second defendant of the statutory duty imposed under the NLC and the second defendant was clearly negligent because the search, albeit a private search pursuant to s 384 of the NLC, disclosed that the first defendant was the registered proprietor of the land at the material time;

(e) the fact that the forged title bearing the description GN 232 was caused by an unidentified third party did not absolve the second defendant's liability arising from its breach of duty of care; and

(f) s 22 of the NLC is inapplicable to the facts of the case and cannot avail the second and third defendants to absolve themselves from liability to the plaintiff.

[8] At the close of the trial, learned counsel for the second and third defendants also took the additional point that they are not liable as the search conducted by the plaintiff on 18 September 2007 at the second defendant's land registry was a private search under s 384 of the National Land Code (NLC) and not an official search under s 385 of the NLC. On this issue, the learned trial judge held as follows:

(a) the failure or omission on the part of the second and third defendants to plead this point in their amended defence is fatal to them; and

(b) there is nothing in s 386 of the NLC which expressly excludes the liability of the second defendant in his official capacity in cases where the person who has requisitioned a private search has acted to his detriment in relying on the result of the search carried out by the officer or staff of the second defendant.

[9] In consequence of the aforesaid findings, the learned trial judge made the following orders:

(a) the plaintiff's claim for RM89,023.23 which was paid by the plaintiff before the first search was conducted was dismissed; and

(b) the plaintiff's claim for RM356,092.80 which was paid upon the execution of the SPA and after the first search was allowed.

A DECISION

[10] The nucleus of the three pleaded causes of action is the accuracy of the registered records in the second defendant's land registry. The evidence showed that the private search on 18 September 2007 found that the registered owner B of the land held under GRN 232, Lot 349 Seksyen 71, Bandar Kuala Lumpur Daerah Kuala Lumpur Negeri Wilayah Persekutuan Kuala Lumpur was the first defendant. On that basis, the plaintiff proceeded to finalise a sale and purchase agreement to purchase the land for RM4,451,160.20. Having paid before the private search RM89,023 as earnest deposit, he paid the balance of C deposit of RM356,092.80 at the time of signing. To complete the purchase, he paid the balance RM4,006,044 by 19 February 2008.

[11] On 3 June 2008, on visiting the land, the plaintiff and his architect was D asked by Mohamad who claimed to be the owner of the land, to leave.

[12] The subsequent official searches on the next day by the plaintiff's solicitors led to the discovery that these was in fact two different sets of titles issued for the land:

E (a) the first defendant was registered as the owner of GRN 232 Lot 349 Seksyen 71, Bandar Kuala Lumpur Daerah Kuala Lumpur Negeri Wilayah Persekutuan Kuala Lumpur; and

(b) Mohamad was registered as the owner of FN 20992 Lot 349 Seksyen 71 F Bandar Kuala Lumpur Daerah Kuala Lumpur Negeri Wilayah Persekutuan Kuala Lumpur.

[13] The two sets of titles for the same land in the land registry leads to no other conclusion that there is something amiss with the records in respect of G that piece of land. It should not have happened. It could only happen by another person in the land registry having access by way of password to access the database of the land registry to create the set of title record. Clearly, it could only happen with the participation of someone in the land registry and not some third party outside alone. Certainly, there is no evidence it could be H accomplished by a third party alone. The submission it was the act of a third party holds no merit. The High Court did not err in finding the second and third defendants had failed to ensure the records for the land are accurate.

[14] No doubt the realisation that the second and third defendants are I responsible for the act of an employee in the land registry prompted the submission that the second and third defendants owe no duty of care to the plaintiff. The submission fails to take into consideration that the second and third defendants are required by the National Land Code to keep and maintain a register of title of lands. The register does not only serve the administrative

function of recording who owns what to protect landowners, but also a more important economic objective of providing assurance to intending purchasers of land that it is safe to purchase land from the person whose name is on the register. Once he gets his name registered as the proprietor in the register of title, his title is indefeasible. Without such assurance, it would be a risky act to buy property, or accept property as security, with the result demand and therefore prices would fall. History has shown that the introduction of the land registration system had a direct correlation with economic development. The submission that the second and third defendants owed no duty to the plaintiff is therefore without merit. Authority carries with it responsibility, and authority over every citizen carries with it responsibility to every citizen affected by the actions or inactions in carrying out that responsibility. It is the basis upon which the relationship of proximity and duty of care is founded, and liability, where the damage suffered is, as in this case, clearly foreseeable.

[15] That the particulars supplied at the time of the first search was accurate at that time is equally without merit. It does not explain why particulars obtained upon a search in the registry can be accurate at one point of time and cease to be accurate at another. Certainly that militates against the *raison d'etre*, the very reason for the existence, of the National Land Code. The submission suggests the private search particulars were accurate until Mohamad emerged as a registered owner of the same land. Even if that were so, it supports the claim that the plaintiff's loss was the result of the particulars supplied at the private search.

[16] There can be no double standard that the record made available upon a private search is, as in this case, wholly erroneous as to who is the owner as opposed to what is expected that it may be less up to date in respect of the dealings recorded. Effectively, the plaintiff was not shown by the land office the correct register when he did the private search.

[17] In perspective, the submission that the second and third defendants are not liable because the private search was a private search and not an official search, is an afterthought recognising that the submission that the particulars obtained under the private search was correct at the time carries no merit. There is no statement in the form for 'Catatan Carian Persendirian' that the particulars found are not binding. To infer that there is such a reservation defeats the purpose and value of the 'Catatan Carian Persendirian'. Brought into the context of the facts of this case, there is no evidence whatsoever when the accuracy of the particulars changed to being inaccurate, except that, at the official searches there emerged record of title with Mohamad as the registered proprietor. The fact is there emerged a second set of title documents, when the appreciable difference between a 'Carian Persendirian' and a 'Carian Rasmi' is that the 'Carian Persendirian' may not show dealings that are in the process of

registration. The apparent difference between ss 384 and 385 of the National Land Code are of little relevance particularly since the cause of action is not the accuracy of what is printed on the 'Carian Persendirian' and the 'Carian Rasmi' but the failure to ensure that the particulars in the register of title are accurate and that it could not possibly be held to be even arguably correct when for the same piece of title there are two sets of record, each with a different person registered as the registered proprietor.

[18] What about the protection accorded under s 22 of the National Land Code? It provides for protection of officers and reads as follow:

> No officer appointed under this Part shall be liable to be sued in any civil court for any act or matter done, or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act.

[19] The intended protection is for wholly different set of circumstances. This is obvious from the words '... in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act'. The existence of two sets of record of title under two different persons as registered owner militates against the conclusion that their action, without explanation, is in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act. The section would apply, in this case, to protect officers for every action they take to find out how it happened and to make sure it never happens again. But not in the circumstances canvassed in the submissions.

[20] Finally the damages. The sale and purchase price was RM4,451,160. Earnest deposit of RM89,023.20 had been paid earlier. The balance payable under the sale and purchase agreement was RM4,451,160 – RM89,023.20 = RM4,362,136. Since RM356,092.80 was paid at time of signing of the agreement, a balance of RM4,006,044 remained to be paid at final settlement. This tallies with the RM2,500,000 + RM1,000,000 + RM506,044 = RM4,006,044. But since only the first deposit of RM89,023.20 is disallowed, the plaintiff is entitled to RM4,362,136 together with interest and costs.

[21] It was submitted for the second and third defendants that the plaintiff had failed to prove his loss. The summary of the defence of the second and third defendants were in respect of liability and not quantum. The issues to be tried include the issue that if the second and third defendants were held liable, the 'quantum of the damages as payable by them to the plaintiff in the circumstances and on the facts of the matter herein'.

[22] The plaintiff, in this case, had produced the sale and purchase agreement and cheques issued.

[23] It is of course established law the loss must be proved. If there is no evidence of loss, no damages for loss can be recovered. But there are two broad categories of losses: special damages and general damages. The definitions vary according to context and jurisdiction, in contract and in tort. But suffice to say that proof is upon a balance of probabilities and not on the standard of beyond reasonable doubt.

[24] Proof on a balance of probabilities simply means that the party upon whom the burden lies, in this case the plaintiff, must put before the court some evidence that tends to prove the loss. Even if the evidence is merely demand made against the plaintiff for payment, it is nevertheless evidence of a loss. It is not the law that he must prove he had paid first before he can recover. In this case, the plaintiff had produced evidence of a sale and purchase agreement, his solicitor's letter forwarding cheques for RM1m and RM506,044, application for loan facility of RM2.5m, the letter of Nik Hussain & Partners forwarding a cheque for the loan of RM2.5m, a statutory declaration of Ng Lai Yin, the proposal to purchase at RM4,451,160, offering immediate payment of earnest deposit of RM89,023.20, further payment of RM356,092.80 as balance of 10% of purchase price, Hong Leong Bank Bhd cheques for RM89,023.20 and RM356,092.80.

[25] It is a common temptation for a party against whom proof is produced to profess that the evidence produced is not satisfactory. The law, however, is not proof and evidence to the satisfaction of a defendant, but whether the court appreciates that it has been proved upon a balance of probabilities. In this case, apart from the second and third defendants' profession of being unsatisfied by the evidence produced by the plaintiff, there is nothing placed on the scales of justice to tilt the balance against the plaintiff.

[26] In the circumstances, we concluded that the second and the third defendants had failed to demonstrate that the High Court had erred, and that the error so affected the merits that appellate intervention is required to correct the injustice occasioned by the error.

CONCLUSION

[27] Accordingly, we dismiss the appeal with costs. The plaintiff's cross-appeal is also dismissed with no order as to costs.

Both appeal and cross-appeal dismissed.

Reported by Ashok Kumar